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REVIEW OF THE WORK OF THE SUB-COMMISSION

Opinion of the Legal Counsel of the United Nations on the "interpretation to be given to paragraph 10 of Economic and Social Council resolution 1503 (XLVIII)"

1. At its 45th session in 1993, the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided, by its decision 1993/104, to study at its 1994 session the question of the reform of the procedure governed by Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970, "including the possible abolition of that procedure." It requested the Secretariat to prepare a working paper on the subject for consideration at that session, and "to obtain the opinion of the UN Legal Counsel on the interpretation to be given to paragraph 10 of resolution 1503(XLVIII)". This note is prepared in response to the latter request.

2. In dealing with this request, I first note that paragraph 10 of the resolution could give rise to a number of questions, although the general meaning of the provision is plain enough. I have tried to identify some of these questions and to comment upon them. However, in order to make a proper analysis, I would need a more precise request. Pending such a request, I have chosen to submit the following in order to assist the Sub-Commission as far as possible.

3. The analysis touches upon the following questions: subject and scope of the review; the entity entitled to conduct a review; the timing of the review; the meaning of "such communications"; and the Optional Protocol to the Covenant on Civil and Political Rights as distinct from the 1503 Procedure.

4. Paragraph 10 of Economic and Social Council resolution 1503 (XLVIII) reads as follows:

> "10. Decides that the procedure set out in the present resolution for dealing with communications relating to violations of human rights and fundamental freedoms should be reviewed if any new organ entitled to deal with such communications should be established within the United Nations or by international agreement."

5. The text of paragraph 10 was proposed by Italy when draft resolution 1503 was considered by the Social Committee in 1970. The sponsor's intention was to "avoid duplication and possible contradiction in the evaluation of the admissibility of communications relating to violations of human rights and fundamental freedoms in the event that new organs entitled to deal with such communications were established, either by international agreement or within the United Nations."1/ As far as the "new organs" are concerned, the sponsor referred specifically to the Human Rights Committee envisaged under the Covenant on Civil and Political Rights and its Optional Protocol, as well as the proposal to establish an Office of High Commissioner for Human Rights which was then under consideration by the General Assembly.2/ Therefore, the purpose of paragraph 10 is to provide an opportunity for review of relevant subsequent developments so as to avoid any conflict with the functions and powers of any new organ that may be created in the future in that field.

A. Subject and scope of the review

6. Paragraph 10 refers to the "procedure" set out in the resolution for dealing with "communications relating to violations of human rights and fundamental freedoms". Essentially, the 1503 Procedure is a system consisting of stage-by-stage evaluation of communications received from persons and organizations to identify serious violations of human rights which appear to reveal a consistent pattern (i.e. situation). Thus, even though the term "procedure" is used, it should however be understood to cover the entire scope of resolution 1503. Originally, the 1503 Procedure had a three-stage mechanism

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1/ See E/AC.7/L.572 and E/AC.7/SR.642. The Italian proposal was adopted without a change at the 643rd meeting of the Social Committee held on 21 May 1970 by 17 votes to none with 8 abstentions (E/AC.7/SR.643). The draft resolution as a whole was adopted by the Council as resolution 1503 by 14 votes to 7 with 8 abstentions.

2/ E/AC.7/SR.642, p. 188.

involving the evaluation first by the Working Group on Communications, then the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and then the Commission on Human Rights. The Working Group on Situations was subsequently added as the third stage before the final examination by the Commission. The functions and powers of each organ in dealing with communications relating to violations of human rights and fundamental freedoms are set out in resolution 1503 and other relevant resolutions (e.g., Council resolutions 1990/41 of 25 May 1990).3/ The subject and scope of the review under paragraph 10 should therefore include not only such aspects as application, admissibility and confidentiality, but also the roles and functions of the organs involved at each stage identified in the various paragraphs of resolution 1503 and other relevant resolutions, and evolved through practice during these years.

7. The competent organ itself must however decide the precise scope of a particular review under consideration, in the light of *inter alia* the functions and powers of the new organ concerned, and its own competence.

B. The entity entitled to conduct a review

8. The wording of paragraph 10 does not specify the entities which are entitled to conduct a review. The wording does not however preclude each of the five organs involved (i.e. the Working Group on Communication, the Sub-Commission of Human Rights, the Working Group on Situations, the Commission on Human Rights, and the Council itself) to initiate reviews on aspects falling within their assigned functions under the 1503 Procedure. Since a subsidiary organ only has competence over functions assigned to it under the 1503 Procedure, any review of an overall nature falls primarily within the purview of the Council itself. This however does not prevent it from delegating this task to the Commission or other organs. Equally, since the 1503 system is created by the Council through its resolution 1503, no other organ is competent to modify it without the authorization of the Council.

9. In March 1993, the Commission on Human Rights adopted resolution 1993/58, which addressed the question of "Effective functioning of the various mechanisms established for supervision, investigation and monitoring of the implementation of the treaty obligations entered into by States in regard to human rights and of the existing international standards in this regard." The Secretary-General was requested to prepare a report to focus on six thematic areas:

3/ The role of each organ is summarized in document E/CN.4/1994/42, paragraphs 53 to 58 and 68 to 76.

(a) Original mandates assigned to the various treaty and non-treaty mechanisms;

(b) International legal norms and standards on which existing non-treaty mechanisms now base their activities;

(c) Conceptual framework, methods of work and procedural rules applied by each non-treaty mechanism in the discharge of its mandate;

(d) Various norms, criteria and practices established by each existing mechanism in regard to the admissibility of communications;

(e) Preliminary consideration and evaluation of communications, their referral to the interested parties and subsequent course of action;

(f) Criteria used in practice by the Centre for Human Rights for channelling communications either to an existing public machinery or into the confidential procedure governed by Economic and Social Council resolution 1503 (XLVIII), together with the legal foundation for such criteria.

The 1503 Procedure formed part of the Secretary-General's report.4/ The Commission however postponed the review to its 1995 session. In August 1993, the Sub-Commission, by its decision 1993/104, decided to study the question of the reform of the 1503 Procedure, including the possible abolition of the procedure. The Secretariat has prepared a working paper for that purpose (E/CN.4/Sub.2/1994/17).

10. Accordingly, two organs are conducting reviews pertinent to the 1503 Procedure. Is there any conflict when concurrent reviews occur? Should there be a priority, and if so, which organ should have priority? Paragraph 10 of Council resolution 1503 provides no answer to these questions. It seems that in such a situation, the organs concerned should bear in mind the scope of their own competence in this matter and the issues of how efficiency can best be achieved.

4/ The Secretary-General's report (E/CN.4/1994/42) deals in some detail with the 1503 procedure and a range of other procedures, treaty-based and non-treaty based. See, for example, paragraphs 50 to 58, 66 to 76 and 82 to 84, which deal respectively with the main features, the method of work and the criteria used for determining whether communications are channelled into a public machinery or into the 1503 Procedure.

C. The timing for the conduct of a review

11. Another question to be considered is when a review would be in order, pursuant to paragraph 10. The condition provided for in paragraph 10 is "... if any new organ entitled to deal with such communications should be established within the United Nations or by international agreement."

12. The word "organ" in paragraph 10 covers not only organs established within the Organization but also entities created by international agreements. The issue of review becomes pertinent for consideration when a new entity comes to existence, whether or not it is an organ within the Organization or a body under an international agreement.

13. In 1978, following the entry into force of the International Covenant on Civil and Political Rights and the Optional Protocol thereto in 1976, the Commission on Human Rights initiated a review of the 1503 Procedure having regard to the coming into operation of the Human Rights Committee, a body entitled to deal with communications concerning violations of human rights under the procedure governed by the Optional Protocol. By its resolution 16 (XXXIV), the Commission requested the Secretary-General to prepare an analysis of existing UN procedures for dealing with communications concerning violations of human rights "to assist the Commission in studying measures to avoid possible duplication and overlapping of work in the implementation of these procedures". The requested analysis was prepared and submitted to the Commission the following year in 1979.5/ Subsequently, the Commission did not take any specific action in this regard.

14. Since 1979, no specific review has been conducted in respect of resolution 1503 even though two further procedures for dealing with communications have come into existence. In this regard, the following may be mentioned as they are empowered to deal with complaints about alleged violations of the provisions of the respective UN international human rights treaties:

- the procedure governed by Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

- the procedure governed by Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination.

5/ The report of the Secretary-General was contained in E/CN.4/1317. Apparently, the report was not discussed by the Commission.

It may also be mentioned that the procedure governed by Article 77 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families also provides for the consideration of communications (the Convention is not yet in force).

15. By its resolution 48/141, the General Assembly decided *inter alia* to create the post of the High Commissioner for Human Rights. Paragraphs 3 and 4 of that resolution set out the responsibilities and functions of the High Commissioner. While the Office of the High Commissioner for Human Rights is a "new organ", the question whether a review is called for under paragraph 10 of resolution 1503 depends *inter alia* on whether the High Commissioner is entitled to deal with "communications relating to violations of human rights and fundamental freedoms" within the meaning of resolution 1503. The Office of Legal Affairs does not possess sufficient information at this stage to provide a clear answer on this issue.

16. The words "should be reviewed" in paragraph 10 of resolution 1503 (XLVIII) suggest that the initiation of a review is not automatic or mandatory, which means that the competent organ concerned enjoys a certain degree of discretion as to when it should initiate a review. This interpretation is confirmed by the drafting history of paragraph 10.6/

D. The Meaning of "Such Communications"

17. The words "such communications" in paragraph 10 refer to "communications relating to violations of human rights and fundamental freedoms". Here guidance could first be sought in Procedures for Dealing with the Question of Admissibility of Communications embodied in the Sub-Commission's resolution 1 (XXIV). These procedures set out (i) standards and criteria; (ii) source of communications; (iii) contents of communications and nature of allegations; (iv) existence of other remedies; (v) timeliness. If admissible, such communications (together with the replies received from Governments thereon) are evaluated by the organs concerned in order to determine whether they reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms. With this procedure and the legislative history of the 1503 Procedure in mind, any review would have to make an evaluation of the corresponding procedures applied by "new organs". In this respect, the review might also consider procedures applied by organs operating at the regional level.

6/ See discussion on paragraph 10 at the Social Committee at its 642nd meeting held on 21 May 1970, E/AC.7/SR.642.

E. The Optional Protocol to the Covenant on Civil and Political Rights as distinct from the 1503 Procedure

18. According to paragraphs 1 and 2 of resolution 1503, communications "received" under the Economic and Social Council resolution 728F (XXVIII) and in accordance with Council resolution 1235 (XLII) are to be channelled into the 1503 Procedure.

19. The 1503 procedures is of a confidential nature in that all communications received thereunder are subject to the rule of confidentiality stated in paragraph 8 of resolution 1503.7/ Communications under the Optional Protocol are treated as confidential, but the views of the Human Rights Committee and decisions of a final nature (e.g. decisions declaring communications inadmissible) are made public, after they have been communicated to the parties concerned.

20. The Optional Protocol Procedure, which deals with individual complaints, is applicable only in respect of States which are Parties to the Protocol, and the content of a communication is limited to those rights specified thereunder (i.e. civil and political rights). The 1503 procedure, concerned with the examination of violations constituting a pattern, is applicable with regard to all States, and covers communications from any individual, group of individuals or non-governmental organization. The content that may form part of a communication is very broad covering all human rights recognized in the Universal Declaration of Human Rights. This distinction should be borne in mind when the aspect of duplication is discussed.

21. Since 1979, a practical working method has been adopted by the Secretariat with the tacit approval of the Commission, to avoid possible duplication of communications under the Optional Protocol and the confidential procedure under resolution 1503.8/

7/ Paragraph 8 states: "... all actions envisaged in the implementation of the present resolution by the Sub-Commission on Prevention of Discrimination and Protection of Minorities or the Commission on Human Rights shall remain confidential until such time as the Commission may decide to make recommendations to the Economic and Social Council."

8/ For background of this practice, see E/CN.4/1994/42, paragraphs 48 and 82.